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No. 4039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG YOU TUN and FONG YOU FOOK,
Appellants,

VS.

JOHN D. NAGLE, as Commissioner of
Immigration for the Port of San
Francisco,
Appellee.

BRIEF FOR APPELLANTS.

DION R. HOLM,
Attorney for Appellants.

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Statement of Facts.

Fong Foo, a person of Chinese descent, first came to the United States in 1887. He made a trip to China November 26, 1907, returning to the United States January 22, 1910. On arriving in 1910 Fong Foo gave the details as to his family in China to the immigration authorities, saying he had three sons, Fong You Sam, 18 years old, who was an adopted son, and with whom we are not concerned, Fong You Fook, two years old, the son about whom these proceedings revolve, and Fong You Mon, one year old. A third son was born to the wife of Fong Foo a few months after the latter had left

China for the United States, named Fong You Tun, one of the appellants herein.

On October 12, 1922, Fong You Tun, Fong You Mon, and Fong You Fook, as of that date aged respectively 12, 13 and 14 years, applied at the Port of San Francisco for admission into the United States as sons of the merchant, Fong Foo.

The testimony of the father, the three boys, and a person named Mar Kim was taken before an Immigration Inspector. On December 4, 1922, the Commissioner of Immigration at Angel Island denied the three boys the right to enter the United States on the ground the relationship between them and Fong Foo, the father, was not established to the Commissioner's satisfaction. The usual ten days were allowed to produce any other evidence tending to prove the relationship.

Fong Cheow, an additional witness, was produced. His testimony was taken and the father and the boys were re-examined. Thereafter, on January 17, 1923, the Commissioner of Immigration again denied to all three of the boys the right to enter and an appeal was perfected to the Secretary of Labor on January 20, 1923.

The decision of the Commissioner excluding all three of the boys was affirmed by the Secretary of Labor on March 5, 1923, but on March 8, 1923, the Secretary of Labor reversed his decision as to Fong You Tun, the youngest of the brothers, and ordered Fong You Mon and Fong You Fook deported.

A petition for writ of habeas corpus was applied for on behalf of Fong You Fook. The matter was argued before the District Court, and on April 23, 1923, a demurrer to the writ was sustained. From this judgment an appeal to this Honorable Court was perfected.

There was no application for a writ made in behalf of Fong You Mon who was, in accordance with the Secretary of Labor's decision, deported to China. The reason for not applying for a writ in behalf of Fong You Mon will appear in the argument in this case.

It was stipulated (T. R. pages 18 and 19) between the attorneys for the appellee and appellants that the original records of the United States Bureau of Immigration, which were filed as Appellee's Exhibits in the District Court, might be transferred in their original form to this Court and considered part of the record. Reference to these exhibits will be made in the argument giving the exhibit cited an initial and page number.

ARGUMENT.

I.

THE HEARINGS ACCORDED FONG YOU FOOK WERE UNFAIR AS THE SECRETARY OF LABOR ADMITTED FONG YOU TUN ON THE SAME EVIDENCE HE EXCLUDED FONG YOU FOOK.

The foregoing constitutes the only point involved in this case.

The evidence consists solely of the testimony of the three boys, the father and the two identifying witnesses. The only basis upon which a decision denying Fong You Fook the right to enter this country could successfully be based, would be upon discrepancies developed from the testimony of the witnesses.

The father's status as a merchant is conceded and the discrepancies must be limited to the questions and answers pertaining to relationship, which is the basis of the decision adverse to Fong You Fook.

The records before the Commissioner of Immigration and the Secretary of Labor, and which are before this Court, consist of Appellee's Exhibits initialed A, B, C, and D. Exhibit A is the only one material to this case.

At pages 41-43, Exhibit A, Immigration Inspector Moore who first heard the case, pointed out discrepancies supposed to have been developed out of statements made by Fong You Fook. Inspector Mayerson, at pages 45, 67 and 69 of Exhibit A, approved of the discrepancies pointed out by Inspector Moore.

The Board of Review at Washington and the Secretary of Labor found Inspectors Moore and Mayerson were in error and the discrepancies actually resulted from misstatement of facts by Fong You Mon, the brother, who was deported to China.

The Secretary of Labor, at page 101, Exhibit A, approved of the following finding of the Board of Review:

“A review of the testimony shows that the alleged father and applicants Fong You Fook and Fong You Tun are in *substantial agreement on the points regarding which they were questioned*, the discrepancies resulting from a comparison of their statements and those of Fong You Mon. From this circumstance, counsel draws the conclusion that the cases of Fong You Fook and Fong You Tun are established, while they apparently feel that there is some doubt as to Fong You Mon. The Board of Review, however, does not believe it is justified in accepting as true with respect to two of the applicants testimony which it thinks is clearly discredited by discrepancies developed when their statements are compared with those of the third. It regards the discrepancies as material, and as affecting the whole case. * * *

It is conceded the record contains discrepancies, but the discrepancies and conflicts in the testimony are not from the result of the testimony given by the identifying witnesses, the father, Fong You Tun, or Fong You Fook, but solely by misstatement of facts by Fong You Mon.

It is obvious from the record that Fong You Mon failed, even for a boy of thirteen (13) years, to meet the difficult burden of proof placed on him by the Immigration laws, of establishing his right to enter this country. He was deported to China. No effort was made to resort to the courts to prevent his deportation.

By reading the testimony given by Fong You Mon it appears that he must have been in a highly nervous frame of mind and frightened while giving his testimony, as he failed to answer many simple questions.

It is not contended the inspectors conducting the examinations were unfair in their treatment of Fong You Mon as it was recognized the fault rested with him in not stating the facts as he knew them.

The record in this case fails to disclose where the testimony of either Fong You Fook or Fong You Tun was in conflict, save in insignificant details, with that of their father or the two identifying witnesses. This statement is substantiated by the excerpt from the finding of the Board of Review, above quoted, and which was made on March 5, 1923, and approved by the Secretary of Labor the same day. While it was held in the findings last referred to, that the father, Fong You Fook and Fong You Tun "are in substantial agreement on the points regarding which they were questioned", yet the Board of Review and the Secretary of Labor recommended and ordered all three boys deported.

The decision may have been reached on the theory the erroneous testimony of Fong You Mon discredited the evidence of Fong You Tun, Fong You Fook, Fong Foo and the two identifying witnesses, or it may have been based on that portion of the

decision at page 101 of Exhibit "A", reading as follows:

"But, if the mother is now sixty years of age, and therefore, about forty-nine in 1910 and forty-seven when the first applicant was born, at which time the alleged father was about forty-eight years of age, it is deemed improbable that persons of their ages would become the parents of three normal children in less than three years."

On March 8, 1923, the same Board of Review and the same Secretary of Labor reversed their ruling as to Fong You Tun. The following excerpt from their findings of March 8, 1923, is to be found at page 105, Exhibit A:

Refers to Report of March 5, 1923, and then says:

"The Board of Review, after again going over this file is inclined to believe that the relationship, so far as Fong You Tun is concerned, may be regarded as reasonably established. He is only twelve years of age, and a review of his testimony shows that he has made a satisfactory and willing witness and has testified in an apparently frank manner. His statements, in all material respects, are in agreement with those of his alleged father. *They disagree with those of one of his alleged brothers, Fong You Mon, in some essential particulars,* but it is believed that these disagreements, so far as he is concerned, may be overlooked, in view of the features already set forth and the fact that there is a striking and convincing resemblance between him and his alleged father. The resemblance is regarded as very significant and as indicating a proba-

bility that this applicant is the son of Fong Foo.

“It is recommended that the previous decision be reversed, so far as Fong You Tun is concerned, and his appeal be sustained.”

From the foregoing we find the Board of Review and the Secretary of Labor abandoned the theories of exclusion as set forth in their findings of March 5, as on March 8, 1923, they found Fong Foo and his wife, despite their age in 1910, could have a normal child born who is now twelve (12) years old, and the discrepancies of testimony occasioned by comparing the evidence of the third brother, Fong You Mon, did not discredit the testimony of the other two brothers.

On March 8, 1923, the youngest son, Fong You Tun was ordered landed. The only difference between the cases of the brothers Tun and Fook is the Secretary of Labor held the photograph of Tun resembled that of his father.

It is to be noted, by inadvertence, a picture of Fong You Mon was not in the record presented to the Department at Washington. Exhibit A, pages 2, 80 and 87, contain the photographs. At page 87 the Immigration Inspector solemnly initials the picture of Fong You Tun as that of Fong You Mon, and as a matter of fact it was a picture of Fong You Tun.

In answer to the finding that the picture of Fong You Tun resembled that of the father's being a

sufficient ground to differentiate Tun's case from Fook's, it is sufficient to say the Chinese Exclusion Act does not contain any provision requiring an applicant to look like his parents, was never so construed, and would be absurd and unlawful to demand such a requirement of an applicant for admission.

The authorities determining what constitutes a fair and what an unfair hearing by the Immigration Authorities, have so frequently been brought to this Court's attention a mere reference to the citations will be made.

Rule 9, Sub. 1—Rules Governing The Admission of Chinese—U. S. Dept. Labor, applying the decision in

176 U. S. 459

(holding Chinese of the Exempt class entitled to bring to the United States their children). Sub. 2 of Rule 9 provides "there shall be exacted convincing proof of the relationship."

Fong Foo is of the exempt class and the evidence introduced in behalf of Fong Fook was determined by the Secretary of Labor to be in substantial agreement on the points regarding which he was questioned with all the other witnesses introduced, except Fong You Mon; (and by admitting Fong Tun showed this was unnecessary) we contend met the burden of proof imposed on him.

No evidence was introduced to disprove the relationship between Fong Foo and Fong You Fook. The following cases hold there must be some sup-

porting evidence to sustain an adverse decision to an applicant.

Whitefield v. Hanges, 222 Fed. 745;
U. S. v. Fong On, 240 Fed. 234;
Aug Chew Lung v. Burnett, 232 Fed. 853;
Chan Kan v. U. S., 232 Fed. 855.

Disregarding evidence of a conclusive character is an abuse of discretion and constitutes an unfair hearing.

Tang Tun v. Edsell, 223 U. S. 673;
Low Wah Suey v. Backus, 225 U. S. 460;
Zakonite v. Wolf, 226 U. S. 272.

It is respectfully contended that the hearings accorded Fong You Fook were unfair as there was no evidence introduced to disprove his claim, and the Secretary of Labor admitted Fong You Tun on the identical evidence he excluded Fong You Fook.

Dated, San Francisco,
September 15, 1923.

Respectfully submitted,
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Attorney for Appellants.